

1 **SECTION 102.** 861.11 (2) (a) (intro.) of the statutes is amended to read:

2 861.11 (2) (a) (intro.) Upon a beneficiary's request for payment, a payer or other
3 3rd party who has received satisfactory proof of the decedent's death and who has not
4 received written notice that the surviving spouse or his or her representative intends
✓5 to file a petition for the deferred marital property elective share amount or that a
6 petition for the election has been filed is not liable for any of the following:

7 **SECTION 103.** 861.11 (2) (b) of the statutes is amended to read:

8 861.11 (2) (b) A payer or other 3rd party is liable for payments made or other
9 actions taken after receipt of written notice of the intent to file a petition for the
✓10 elective share amount or written notice that a petition for the elective share amount
11 has been filed.

12 **SECTION 104.** 861.11 (5) (b) of the statutes is amended to read:

13 861.11 (5) (b) Notwithstanding sub. (2), in addition to the protections afforded
14 a financial institution under ss. 701.19 (11) and 710.05 and chs. 112 and 705 a
15 financial institution is not liable for having transferred an account included in the
16 augmented deferred marital property estate under s. 861.03 to a beneficiary
17 designated in a governing instrument, or for having taken any other action in
18 reliance on the beneficiary's apparent entitlement under the terms of a governing
19 instrument, regardless of whether the financial institution received written notice
20 of an intent to file, or the filing of, a petition for the deferred marital property elective
✓21 share amount.

22 **SECTION 105.** 861.17 (3) of the statutes is amended to read:

23 861.17 (3) If the spouse is successful in an action to reach fraudulent property
✓24 arrangements, recovery is limited to the share amount the spouse would receive
25 under ch. 852 and this chapter. Other rules of this chapter apply so far as possible.

1 Recovery forfeits any power of appointment which the surviving spouse possesses
2 over the remaining portion of the fraudulently arranged property, except a special
3 power.

4 **SECTION 106.** 861.21 (1) (a) of the statutes is amended to read:

✓5 861.21 (1) (a) "Governing instrument" has the meaning given in s. 854.01 (1).

6 **SECTION 107.** 861.31 (4) (a) of the statutes is amended to read:

✓7 861.31 (4) (a) Any entitlement of the surviving spouse under s. 853.11 (2)
8 853.12.

9 **SECTION 108.** 861.35 (1m) (intro.) of the statutes is amended to read:

10 861.35 (1m) (intro.) If the decedent is survived by a spouse or by children, the
11 court may, subject to sub. (1r), order an allowance for the support and education of
12 each dependent child and for the support of the spouse. This allowance may be made
13 whether the estate is testate or intestate. If the decedent is not survived by a spouse,
14 the court also may, subject to sub. (1r), allot directly to any of the dependent children
15 household furniture, furnishings, and appliances. No allowance may be made under
16 this section if any of the following apply applies:

17 **SECTION 109.** 861.35 (1m) (a) of the statutes is amended to read:

18 861.35 (1m) (a) The decedent has amply provided for each dependent child and
19 for the spouse by the ~~terms of his or her will and the estate is sufficient to carry out~~
20 ~~the terms after payment of all debts and expenses~~ transfer of probate or nonprobate
21 assets, or support and education have been provided for by any other means.

22 **SECTION 110.** 861.35 (1m) (b) of the statutes is amended to read:

23 861.35 (1m) (b) In the case of dependent children, if the surviving spouse is
24 legally responsible for support and education and has ample means to provide them
25 in addition to his or her own support.

1 **SECTION 111.** 861.35 (1m) (c) of the statutes is amended to read:

2 861.35 (1m) (c) In the case of the surviving spouse, if he or she has ample means
3 to provide for his or her support.

4 **SECTION 112.** 861.35 (1r) of the statutes is created to read:

✓ 5 861.35 (1r) The court may order an allowance under sub. (1m) for an adult child
6 of the decedent who was being supported by the decedent at the time of the decedent's
7 death only if the court finds, under the facts and circumstances, that the decedent
8 intended to continue support of the adult child after the decedent's death. Extrinsic
9 evidence may be used to determine that intent, but a decedent's signed statement of
10 intent that support not be awarded to an adult child is binding on the court.

11 **SECTION 113.** 861.35 (4) (a) of the statutes is amended to read:

12 861.35 (4) (a) Any entitlement of the surviving spouse under s. 853.11 (2)
✓ 13 853.12.

14 **SECTION 114.** 863.15 of the statutes is amended to read:

15 **863.15 Right of retention Debts to estate.** ~~When If~~ a distributee of an estate
16 is indebted to the estate, the amount of the indebtedness if due, or the present worth
17 of the indebtedness, if not due, shall be treated as an offset by the personal
18 representative against property of the estate to which the distributee is entitled. In
19 contesting the offset the distributee shall have the benefit of any defense which
20 would be available to the distributee in a direct proceeding by the personal
✓ 21 representative for the recovery treatment of the debt is governed by s. 854.12.

22 **SECTION 115.** 865.07 (1) (d) of the statutes is amended to read:

23 865.07 (1) (d) The decedent died intestate or testate, and, if testate, whether
24 the original will is in the possession of the court or accompanies the application and,
25 contains an attestation clause showing compliance with the requirements of

1 execution under s. 853.03 or 853.05 or includes an affidavit in substantially the form
2 under s. 853.04 (1) or (2), and does not expressly prohibit informal administration;

3 **SECTION 116. Initial applicability.**

4 (1) The treatment of section 40.02 (8) (a) 2. of the statutes first applies to deaths
5 occurring on the first day of the 10th month beginning after the effective date of this
6 subsection.

7 (END)

first applies to deaths
occurring on

Jan, 1999,

except w/ respect
to irrevocable

gov instrument
executed before that
date

97 act 188

memorandum

Case Davis R
w/Q's

October 23, 2001

TO: Pam Kahler, LRB

FROM: "Article II" Committee

RE: Comments on LRB Draft 0718/P2 (also comments on draft itself)

Question on cover sheet regarding effective date.

We will of course still need to deal with the question of effective date for the other provisions.

Most of the changes are just clarifications, and they should look back to January 1, 1999, applying to revocable governing instruments existing on that date and to all instruments executed on or after that date. *transfers due to deaths on Jan 1, 1999? (problem - what if probate concluded?)*

The change to 701.19 [with application date provided at 701.24] should apply to all governing instruments, since it removes an unnecessarily harsh restriction intended to prevent inadvertent taxation, and the revision succeeds in maintaining that benefit.

Some changes need to be prospective, and should apply to revocable governing instruments existing on the effective date of the new legislation, to all instruments executed on or after that date, and to the intestate estates of people who die on or after that date. When we last assessed this, the provisions that seem to be changes in the rules, and that there should be prospective only, are these:

§ 705.04(2) POD bank accounts.

§ 705.27 TOD Securities

§ 852.01(1)(a)2.b. spousal share in complex intestacy [change to 2.a. is only a clarification]

? § 853.32(2) Statement passing tangible personal property [dating requirement, and trigger date only]

? § 854.03 120 hour survivorship. reachout provision only

§ 854.08 Nonademption

§ 861.35 Allowance after period of administration.

854.12 Debt to transferor.

first applies to transfers due to deaths on effective date

in what respect? why was date stricken?

?

In any case, does 701.24 need to be amended to take into account the effective date of changes made by 1997 Act 188, as well as by the current legislation?

✓ s. 40.18

Need to add an additional provision that deferred marital property elections apply to Ch. 40.

✓ s. 701.20

Please add to 701.20[5][d]:

701.20 Principal and income.

(5) INCOME EARNED DURING ADMINISTRATION OF A DECEDENT'S ESTATE.

(d) A legatee, including a trustee, of a specific amount of money not determined by a pecuniary formula shall not be paid any part of the income of the estate but shall receive interest on any unpaid portion of the legacy for the period commencing one year after decedent's death at the legal rate set forth in s. 138.04. For the purpose of this subdivision, the deferred marital property elective share amount elected by a surviving spouse under s. 861.02(1) is a bequest of a specific amount of money not determined by a pecuniary formula.

shall be treated as

shall be considered to be

COMMITTEE NOTE:

Because of the shift in the deferred marital property election from a direct property interest to an elective share amount, 1997 Act 188 removed a sentence from § 701.20 (5)(b) that stated that property received under the election would be treated like a specific bequest. The amendment adds an analogous provision to § 701.20 (5)(d), providing that the elective share amount will be treated like a bequest of a specific amount of money.

766.61[2]

1
Please amend to specify that ETF is a "policy issuer," possibly by adding a definition of "policy issuer" under [2][a].

group is b1? (self-insure or contract w/ insurer)

does ETF issue policies? or do they want to expand the def. of "policy"?

✓ 766.62

Please add the essence of the following two provisions to 766.62[4], replacing "financial institution" with "deferred employment benefit plan administrator."

854.23[5](c) If a financial institution has reason to believe that a dispute exists as to the rights of parties, or their successors, to an account subject to a governing instrument, the

financial institution may, but is not required to, do any of the following:

1. Deposit the account with a court as provided in sub. (4).
2. Refuse to transfer the account to any person.

854.23[5](d) The protection afforded a financial institution under this subsection does not affect the rights of parties or their successors in disputes concerning the beneficial ownership of accounts.

851.055

Please create 851.055[1m] to read as follows:

[1m] Is not classified as individual property or marital property under a valid marital property agreement, unless the agreement provides otherwise.

851.31

The language in the draft creates a problem because in general we do want incorporated documents to be considered "wills." We propose language similar to that in our 9/00 memo:

853.32 Effect of reference to another document. (1) INCORPORATION. A will may incorporate by reference another writing or document if all of the following apply:

(d) The will was executed in compliance with s. 853.03 or 853.05. It is not necessary that the other writing or document be executed in compliance with s. 853.03 or 853.05.

(2) DISPOSITION OF TANGIBLE PERSONAL PROPERTY. (a)....

(b) Another document under par. (a) is valid even if it does not exist when the will is executed, even if it is changed after the will is executed, and even if it has no significance except for its effect on the disposition of property by the will, and even if its execution does not comply with s. 853.03(2).

854.01[1]

We request this additional change:

"Extrinsic evidence" means evidence not contained in a governing instrument.

in 854.09, ext. evi refers to outside something other than a gov int.
d-note →

854.03

For [5][g], [h], and [i], it doesn't seem correct to refer to "the" governing instrument. There might not be a governing instrument, but if there is, then these three provisions apply.

stat or govern?

854.08[5]

Please add a provision that sale under a power of attorney will be treated the same way as sale by a conservator. However, this raises the question of what to do about a person who is incapacitated and then recovers capacity. For a person adjudicated incompetent, it's easy, but not under a POA, where determination of incapacity is either not required or is done without court intervention.

We also would like to change sub [6] as follows:

(6) ~~LIMITATIONS.~~ EXCEPTIONS. (a) This section is inapplicable if any of the following applies:

1. ~~The governing instrument, either expressly or as construed from extrinsic evidence, shows the intent that a transfer fail under the particular circumstances. There is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.~~

854.08[6]

s. 854.08[6], re exceptions to the ademption rule, states that

[a] 2. The person who executed the governing instrument gives property during the person's lifetime to the specific beneficiary with the intent of satisfying the specific gift. Extrinsic evidence may be used to construe that intent.

However, this provision does not say whether proof of that intent needs to meet the criteria of 854.09[1], which explicitly deals with satisfaction. We think that 854.08[6][a]2 needs a cross reference to the rule in 854.09[1].

854.12

We have rethought what we want here. Here is our current request:

854.12 Debt to transferor. (1) Subject to sub (3), when an heir or a transferee under a revocable governing instrument survives the decedent and is indebted to the decedent, the amount of the indebtedness if due, or the present worth of the indebtedness, if not due, shall be treated as an offset against property to which the debtor is entitled. The amount

treated as an offset shall be distributed as an asset of the transferor's probate estate. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the shares of the debtor's issue.

(2) Subject to sub (3), in contesting the offset under sub (1) the debtor shall have the benefit of any defense which would be available to the debtor in a direct proceeding by the personal representative for the recovery of the debt, except that the debtor may not defend on the basis that the debt was discharged in bankruptcy, unless the transfer is under a governing instrument and the discharge occurred before the execution of the instrument.

(3) Contrary intent. This section does not apply if the transfer is under a governing instrument and there is a finding of contrary intent of the person who executed the instrument. Extrinsic evidence may be used to construe that intent.

854.20 - .21

✓ Current 854.20[3] only applies to sub[2], just as [4] only applies to sub[1]. Given that in the draft legislation [4] has been integrated into [1], we request that [3] be integrated into [2]. [If we don't do that then 854.21[1][b] needs to be amended, because it incorporates 854.20[2] by reference without including 854.20[3].]

Additional item:

✓
(?) To make 854.20 and .21 more parallel, we request that 854.21[1][a] incorporate 854.20[1] by reference, instead of repeating its provisions.

just 1., 2., + 3. ?

854.225

→ Since there are many places where chp. 854 provides that the statute yields to the transferor's intent, we believe that there should be a general statement stating that transferor's intent can't contravene public policy.

854.225. Limit on use of evidence of testator's intent. Evidence of the transferor's intent cannot be used to the extent that implementation of that intent is contrary to a mandatory provision in an applicable statute or to the public policy of this state.

861.21

✓ We request the underlined change to 861.21[4] to clarify that sub [4] does not create a new right, but only implements the right created under [2] and [3].

(4) PAYMENT BY SURVIVING SPOUSE. The court shall assign the interest in the home as determined under sub [2] and [3] to the surviving spouse upon payment of the value of the interest that does not pass to the surviving spouse

under intestacy or under the governing instrument. Payment shall be made to the fiduciary holding title to the interest. The surviving spouse may use assets due him or her from the fiduciary to satisfy all or part of the payment in kind. Unless the court extends the time, the surviving spouse shall have one year from the decedent's death to pay the value of the assigned interest.

Initial applicability

Please see note at the beginning of this memo.

12/13/01

PROPOSED REVISION OF S. 854.12

WORKING FROM LRB DRAFT 0718/P2

854.12 Debt to transferor. (1) HEIR UNDER INTESTACY. (a) If an heir owes a debt to the decedent, the amount of the indebtedness shall be offset against the intestate share of the debtor.

(b) In contesting an offset, the transferee shall have the benefit of any defense that would be available to the transferee in a direct proceeding by the personal representative for the recovery of the debt, except that the transferee may not defend on the basis that the debt was discharged in bankruptcy or on the basis that the relevant statute of limitations has expired. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the intestate shares of the debtor's issue.

(2) RECIPIENT UNDER GOVERNING INSTRUMENT. (a) Subject to par. (c), if a transferee under a revocable governing instrument survives the transferor and is indebted to the transferor, the amount of the indebtedness shall be treated as an offset against property to which the transferee is entitled.

(b) Subject to par. (c), in contesting an offset under par. (a), the transferee shall have the benefit of any defense that would be available to the transferee in a direct proceeding by the personal representative for the recovery of the debt, except that the transferee may not defend on the basis that the debt was discharged in bankruptcy (unless that discharge occurred before the execution of the governing instrument) or on the basis that the relevant statute of limitations has expired. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the entitlement of alternate beneficiaries.

(c) Paragraph (a) or (b) does not apply if there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.



State of Wisconsin
2001 - 2002 LEGISLATURE

LRB-0718/P2

PJK:jld:jf

** due Thurs or sooner ** *min is min*

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

*D-note
soon
(1-4)*

regenerate ↓

1 AN ACT *to repeal* 854.03 (3), 854.03 (4), 854.03 (7), 854.06 (1) (b), 854.14 (1) and
2 861.04 (2); *to renumber* 701.115 (1) and 861.04 (1); *to renumber and amend*
3 701.24, 705.04 (2), 852.01 (1) (a) 2., 853.11 (2), 854.01, 854.06 (4) (a), 854.15 (1)
4 (e), 854.20 (1), 854.20 (4), 861.01 (3) and 861.02 (8); *to amend* 40.02 (8) (a) 2.,
5 700.11 (1), 701.115 (2), 701.115 (3), 701.24 (title), 702.03 (1), 705.27, 766.61 (7),
6 766.62 (5) (intro.), 767.266 (1) (b), 851.31, 851.50, 852.01 (1) (b), 852.12, 853.03
7 (2) (intro.), 853.03 (2) (a), 853.03 (2) (b), 853.03 (2) (c), 853.11 (3), 853.11 (6) (c),
8 853.11 (6) (d), 853.32 (2) (a), 854.03 (2) (b), 854.03 (6), 854.04 (1) (a), 854.04 (5)
9 (intro.), 854.05 (5), 854.06 (4) (b), 854.07 (3), 854.13 (7) (a), 854.13 (8), 854.13
10 (9), 854.13 (10), 854.14 (5) (a), 854.14 (5) (b), 854.14 (5) (c), 854.17, 854.18 (1)
11 (a) (intro.), 854.18 (3), 854.20 (2) (intro.), 854.20 (2) (b), 854.20 (3), 854.20 (5),
12 854.21 (1) (a) (intro.), 854.21 (1) (b), 856.05 (5), 856.15 (1), 856.17, subchapter
13 II (title) of chapter 861 [precedes 861.018], 861.02 (title), 861.02 (4), 861.02 (6),
14 861.02 (7) (b), 861.05 (2) (title), 861.06 (title), 861.06 (2) (title), 861.06 (2) (b)
15 (intro.), 861.06 (2) (b) 4. a., 861.07 (2) (intro.), 861.10 (1), 861.10 (2), 861.11 (2)

(a) (intro.), 861.11 (2) (b), 861.11 (5) (b), 861.17 (3), 861.21 (1) (a), 861.31 (4) (a), 861.35 (1m) (intro.), 861.35 (1m) (a), 861.35 (1m) (b), 861.35 (1m) (c), 861.35 (4) (a), 863.15 and 865.07 (1) (d); **to repeal and recreate** 701.19 (10), 853.04 (3) and 856.16; and **to create** 40.18, 701.115 (1) (a), 701.24 (2), 705.04 (2) (b), 705.04 (2) (d), 852.01 (1) (a) 2. b., 854.03 (5) (g), 854.03 (5) (h), 854.03 (5) (i), 854.04 (7), 854.06 (4) (am), 854.12, 854.13 (2) (gm), 854.14 (3m), 861.01 (4), 861.02 (8m), 861.05 (1) (e), 861.05 (2m) and 861.35 (1r) of the statutes; **relating to:** miscellaneous modifications to the probate code.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 40.02 (8) (a) 2. of the statutes is amended to read:

40.02 (8) (a) 2. In the absence of a written designation of beneficiary, or if all beneficiaries so designated die before filing with the department an application for any death benefit payable, the person determined in the following sequence: group 1, widow or widower; group 2, ~~children if at least one child survives the participant, employee or annuitant, in which event the share of any deceased child shall be payable to the surviving spouse of the child or to the surviving children of the child if there is no spouse, or otherwise to the other eligible children in this group;~~ group 3, ~~grandchild;~~ group 4, parent; group 5, ~~brother and sister~~ issue, as defined in s. 851.13, per stirpes, as described in s. 854.04 (1). No payment may be made to a person included in any group 2 if there is a living person in any preceding group 1.

SECTION 2. 40.18 of the statutes is created to read:

40.18 Applicability of other statutes. (1) MARITAL PROPERTY RIGHTS.

Chapter 766 applies to ownership rights of a spouse in benefits provided under this chapter.

(2) TRANSFERS AT DEATH. Chapter 854 applies to transfers at death under this chapter.

SECTION 3. 700.11 (1) of the statutes is amended to read:

700.11 (1) If a statute or governing instrument, [✓]as defined in s. 854.01 (1), specifies that property is to be distributed to, or a future interest is to be created in, a designated individual's "heirs," "heirs at law," "next of kin," "relatives," or "family," or a term that has a similar meaning, or if a class gift in favor of "descendants," "issue," or "heirs of the body" does not specify the manner in which the property is to be distributed among the class members, the property is distributed according to s. 854.22.

SECTION 4. 701.115 (1) of the statutes is renumbered 701.115 (1) (b).

SECTION 5. 701.115 (1) (a) of the statutes is created to read:

701.115 (1) (a) In par. (b), "revocable trust" means a trust that the grantor, at the time of death, was alone empowered to change or revoke, by law or under the instrument creating the trust, regardless of whether the grantor then had the capacity to exercise the power.

***NOTE: I changed "governing instrument" in the proposed language to "instrument creating the trust." I also changed "decendent" to "grantor," since that is the term used in newly renumbered s. 701.115 (1) (b). Is this okay?

SECTION 6. 701.115 (2) of the statutes is amended to read:

701.115 (2) Survivorship under sub. (1) (b) is governed by s. 854.03.

SECTION 7. 701.115 (3) of the statutes is amended to read:

1 701.115 (3) The rights of the issue of a predeceasing beneficiary under sub. (1)
2 (b) are governed by s. 854.06.

3 SECTION 8. 701.19 (10) of the statutes is repealed and recreated to read:

4 701.19 (10) RESTRICTION ON EXERCISE OF POWERS. (a) Except as provided in ~~par.~~ ^{par.}

5 (c) ~~and (d)~~ a person may not exercise any of the following powers conferred upon the
6 person in his or her capacity as trustee:

7 1. The power to make discretionary distributions of trust principal or income
8 if the distributions are to himself or herself or for the discharge of his or her legal
9 obligations.

10 2. The power to make discretionary allocations of receipts or expenses as
11 between principal and income if the allocations are in his or her favor.

12 (b) If a power under par. (a) is conferred upon more than one person as trustee,
13 a person who is not disqualified to act under par. (a) may exercise the power for the
14 benefit of the person who is disqualified to act, unless the creating instrument
15 expressly provides otherwise. A special trustee appointed by a court may exercise
16 a power under par. (a) for the benefit of the person if there is no other trustee qualified
17 to exercise the power.

18 (c) Paragraph (a) does not apply if ^{any of the following applies: 41.} the person is also the settlor of the trust, and
19 the trust may be revoked or amended by the settlor.

20 (d) Paragraph (a) does not apply with respect to a power under par. (a) 1. or 2.
21 if any of the following applies:

22 2. The terms of the creating instrument specifically limit the scope of the power
23 to expenditures and distributions of income or principal on the basis of an
24 ascertainable standard relating to the person's health, maintenance, support, or

having or exercising the power ✓

1 education such that the person would not be subject to tax under section 2041 or 2514
2 of the Internal Revenue Code as a result of ~~the distribution or allocation~~.

3 ~~3~~ 4. The person is the spouse, widow, or widower of the settlor of the trust, and
4 a marital deduction has been allowed for federal gift or estate tax purposes with

5 respect to the trust property that is subject to the ~~distribution or allocation~~ *power*.

6 ~~4~~ 5. The creating instrument negates the application of par. (a) with respect to
7 the power.

8 **SECTION 9.** 701.24 (title) of the statutes is amended to read:

9 **701.24 (title) Applicability of ss. 701.01 to 701.23.**

10 **SECTION 10.** 701.24 of the statutes is renumbered 701.24 (1) and amended to
11 read:

12 701.24 (1) Except as otherwise provided in sub. (2) and s. 701.19 (9) (a) ~~and (10)~~,
13 ss. 701.01 to 701.23 are applicable to a trust existing on July 1, 1971, as well as a trust
14 created after such date, and shall govern trustees acting under such trusts. If
15 application of any provision of ss. 701.01 to 701.23 to a trust in existence on August
16 1, 1971, is unconstitutional, it shall not affect application of the provision to a trust
17 created after that date.

18 **SECTION 11.** 701.24 (2) of the statutes is created to read:

19 701.24 (2) Section 701.19 (10) is applicable to a trust existing on the effective
20 date of this subsection [revisor inserts date], as well as a trust created after that
21 date, and shall govern trustees acting under such trusts. If application of any
22 provision of s. 701.19 (10) to a trust in existence on the effective date of this
23 subsection [revisor inserts date], is unconstitutional, it shall not affect application
24 of the provision to a trust created after that date.

Insert 5-7

****NOTE: Do you want the change to s. 701.19 (10) to apply to a trust existing on the effective date?

2

SECTION 12. 702.03 (1) of the statutes is amended to read:

702.03 (1) Unless a contrary intention is found, if a governing instrument, as defined in s. 854.01 (1), creating a power of appointment expressly requires that the power be exercised by any type of reference to the power or its source, it is presumed that the donor's intention in requiring the reference was to prevent an inadvertent exercise of the power. Extrinsic evidence may be used to show contrary intent.

SECTION 13. 705.04 (2) of the statutes is renumbered 705.04 (2) (intro.) and amended to read:

705.04 (2) (intro.) If the account is a P.O.D. account, on the death of the original payee or the survivor of 2 or more original payees, any sums remaining on deposit belong to the P.O.D. beneficiaries if surviving, or to the survivor of them if one or more die before the original payee. Payment may be made to a minor P.O.D. beneficiary, however, only in accordance with a procedure approved in ch. 880. all of the following apply:

(a) If there are 2 or more P.O.D. beneficiaries and they all survive, they shall be are entitled to payment of the sums on deposit in accordance with ~~such~~ any written instructions ~~as may have been~~ that the owner filed with the financial institution, ~~and~~ or, if none, to payment in equal shares. There

(c) If 2 or more ~~beneficiaries~~ persons succeed to ownership of the account, there is no further right of survivorship in the event of the death of one of 2 or more P.O.D. beneficiaries after their entitlement to payment has matured unless the terms of the account expressly provide for survivorship or for the account's continuance as a joint account.

Insert 6-23

SECTION 14. 705.04 (2) (b) of the statutes is created to read:

705.04 (2) (b) If ~~one or more~~ ^{any} P.O.D. ~~beneficiaries has predeceased~~ ^{beneficiary predeceases} the original payee or the survivor of 2 or more original payees, the rights of the beneficiaries are determined by any written instructions that the owner filed with the financial institution ~~or, if none, by s. 854.06.~~ ^{Insert 7-5 ✓}

SECTION 15. 705.04 (2) (d) of the statutes is created to read:

705.04 (2) (d) ^f Payment may be made to a minor P.O.D. beneficiary only in accordance with a procedure approved in ch. 880.

SECTION 16. 705.27 of the statutes is amended to read:

705.27 Ownership on death of owner. On death of a sole owner or the last to die of multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners and to any predeceased beneficiary's issue who would take under s. 854.06 (3). On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the ~~beneficiary or beneficiaries who survive the death of all owners~~ successors to the ownership interest. Until division of the security after the death of all owners, ~~multiple beneficiaries surviving the death of all owners~~ successors to the ownership interest hold their interests as tenants in common. If no beneficiary or predeceased beneficiary's issue who would take under s. 854.06 (3) survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of multiple owners.

SECTION 17. 766.61 (7) of the statutes is amended to read:

766.61 (7) If Except as provided in s. 854.14 (3m) (b) 2., [✓] if a noninsured spouse predeceases an insured spouse, the marital property interest of the decedent spouse

1 in a policy which designates the surviving spouse as the owner and insured is limited
2 to a dollar amount equal to one-half of the marital property interest in the
3 interpolated terminal reserve and in the unused portion of the term premium of the
4 policy on the date of death of the deceased spouse. All other rights of the decedent
5 spouse in the ownership interest or proceeds of the policy, other than the marital
6 property interest described in this subsection, terminate at the decedent spouse's
7 death.

8 **SECTION 18.** 766.62 (5) (intro.) of the statutes is amended to read:

9 766.62 (5) (intro.) If Except as provided in s. 854.14 (3m) (c), if the nonemployee
10 spouse predeceases the employee spouse, the marital property interest of the
11 nonemployee spouse in all of the following terminates at the death of the
12 nonemployee spouse:

13 **SECTION 19.** 767.266 (1) (b) of the statutes is amended to read:

14 767.266 (1) (b) That one or both spouses will make a particular disposition in
15 a will or other governing instrument, as defined in s. 854.01 (1). 2

16 **SECTION 20.** 851.31 of the statutes is amended to read:

17 **851.31 Will.** "Will" includes a codicil and any document incorporated by
18 reference in a testamentary document under s. 853.32 (1) or (2). "Will" does not
19 include a copy, unless the copy has been proven as a will under s. 856.17, but "will"
20 does include a properly executed duplicate original. 2

21 **SECTION 21.** 851.50 of the statutes is amended to read:

22 **851.50 Status of adopted persons.** The status of adopted persons for
23 purposes of inheritance and transfers under wills or other governing instruments,
24 as defined in s. 854.01 (1), is governed by ss. 854.20 and 854.21.

1 **SECTION 22.** 852.01 (1) (a) 2. of the statutes is renumbered 852.01 (1) (a) 2.
2 (intro.) and amended to read:

3 852.01 (1) (a) 2. (intro.) If there are surviving issue one or more of whom are
4 not issue of the surviving spouse, one-half of decedent's property other than ~~marital~~
5 the following property:

6 a. Marital property. ✓ The decedent's interest in

7 **SECTION 23.** 852.01 (1) (a) 2. b. of the statutes is created to read:

8 852.01 (1) (a) 2. b. Property held equally and exclusively with the surviving
9 spouse as tenants in common. ✓ The decedent's interest in

10 **SECTION 24.** 852.01 (1) (b) of the statutes is amended to read:

11 852.01 (1) (b) To the issue, per stirpes, the share of the estate not passing to the
12 spouse under par. (a), or the entire estate if there is no surviving spouse. If there are
13 issue ~~other than children, those of more remote degrees take per stirpes.~~

14 **SECTION 25.** 852.12 of the statutes is amended to read:

15 **852.12 Debts to decedent.** If an heir owes a debt to the decedent, the
16 treatment of that debt shall be charged against the intestate share of the debtor,
17 ~~regardless of whether the debt has been discharged in bankruptcy. If the debtor fails~~
18 ~~to survive the decedent, the debt shall not be taken into account in computing the~~
19 ~~intestate shares of the debtor's issue~~ is governed by s. 854.12. ✓

20 **SECTION 26.** 853.03 (2) (intro.) of the statutes is amended to read:

21 853.03 (2) (intro.) It must be signed by 2 or more witnesses, each of whom
22 signed within a reasonable time after ~~witnessing~~ any of the following:

23 **SECTION 27.** 853.03 (2) (a) of the statutes is amended to read:

24 853.03 (2) (a) The signing of the will as provided under sub. (1), in the conscious
25 presence of the witness.

✓
Insert 9-19

1 **SECTION 28.** 853.03 (2) (b) of the statutes is amended to read:

2 853.03 (2) (b) The testator's implicit or explicit acknowledgement of the
3 testator's signature on the will, ~~within~~ in the conscious presence of each of the
4 witnesses witness.

5 **SECTION 29.** 853.03 (2) (c) of the statutes is amended to read:

6 853.03 (2) (c) The testator's implicit or explicit acknowledgement of the will,
7 ~~within~~ in the conscious presence of each of the witnesses witness.

8 **SECTION 30.** 853.04 (3) of the statutes is repealed and recreated to read:

9 853.04 (3) EFFECT OF AFFIDAVIT. The effect of an affidavit in substantially the
10 form under sub. (1) or (2) is as provided in s. 856.16.

11 **SECTION 31.** 853.11 (2) of the statutes is renumbered 853.12, and 853.12 (1), (2)
12 (intro.), (b) and (c), (3) (intro.) and (4) (intro.) and (b), as renumbered, are amended
13 to read:

14 853.12 (1) ENTITLEMENT OF SURVIVING SPOUSE. Subject to ~~par. (e)~~ sub. (3), if the
15 testator married the surviving spouse after the testator executed his or her will, the
16 surviving spouse is entitled to a share of the probate estate.

17 (2) VALUE OF SHARE. (intro.) The value of the share under ~~par. (a)~~ sub. (1) is the
18 value of the share that the surviving spouse would have received had the testator
19 died with an intestate estate equal to the value of the net estate of the ~~decedent~~
20 testator less the value of all of the following:

21 (b) All devises to or for the benefit of the issue of a child described in ~~subd. 1.~~
22 par. (a).

23 (c) All devises that pass under s. 854.06, 854.07, 854.21, or 854.22 to or for the
24 benefit of children described in ~~subd. 1.~~ par. (a) or issue of those children.

Insert 10-10

1 (3) EXCEPTIONS. (intro.) Paragraph (a) Subsection (1) does not apply if any of
2 the following applies:

3 (4) PRIORITY AND ABATEMENT. (intro.) In satisfying the share provided by this
4 subsection section:

5 (b) Devises other than those described in ~~par. (b) 1. to 3.~~ sub. (2) (a) to (c) abate
6 as provided under s. 854.18.

7 **SECTION 32.** 853.11 (3) of the statutes is amended to read:
8 853.11 (3) ~~FORMER SPOUSE~~ REVOCATION BY DIVORCE. The effect of a A transfer
9 under a will to a former spouse is governed by s. 854.15.

10 **SECTION 33.** 853.11 (6) (c) of the statutes is amended to read:
11 853.11 (6) (c) If a subsequent will that wholly or partly revoked a previous will
12 is itself revoked by another, later will, the previous will or its revoked part remains
13 revoked, unless it or its revoked part is revived. The previous will or its revoked part
14 is revived to the extent that it appears from the terms of the later will, or from the
15 testator's contemporary or subsequent declarations, that the testator intended the
16 previous will or its revoked part to take effect.

17 **SECTION 34.** 853.11 (6) (d) of the statutes is amended to read:
18 853.11 (6) (d) In the absence of an original valid will, ~~establishment of the~~
19 ~~execution and validity of the revived will or part is governed by~~ may be established
20 as provided in s. 856.17.

21 **SECTION 35.** 853.32 (2) (a) of the statutes is amended to read:

1 853.32 (2) (a) A reference in a will ~~executed on or after May 3, 1996~~, to another
2 document that lists tangible personal property not otherwise specifically disposed of
3 in the will disposes of that property if the other document describes the property and
4 the distributees with reasonable certainty and is signed and dated by the decedent.
5 A document that is not dated but that fulfills all of the other requirements under this
6 paragraph may be enforced in the discretion of the court.

7 **SECTION 36.** 854.01 of the statutes is renumbered 854.01 (intro.) and amended
8 to read:

9 **854.01 (intro.) Definition Definitions.** In this chapter, "governing:

10 **(1)** "Governing instrument" means a will; a deed; a trust instrument; an
11 insurance or annuity policy; a contract; a pension, profit-sharing, retirement, or
12 similar benefit plan; a marital property agreement under s. 766.58 (3) (f); a
13 beneficiary designation under s. 40.02 (8) (a); an instrument under ch. 705; an
14 instrument that creates or exercises a power of appointment; or any other
15 dispositive, appointive, or nominative instrument that transfers property at death.

16 **SECTION 37.** 854.03 (2) (b) of the statutes is amended to read:

17 854.03 (2) (b) Except as provided in sub. (5), if property is transferred under
18 a governing instrument that establishes 2 or more coowners with right of
19 survivorship, and if it is not established that at least one of the coowners survived
20 the others by at least 120 hours, the property is transferred to the coowners in
21 proportion to their ownership interests.

22 **SECTION 38.** 854.03 (3) of the statutes is repealed.

23 **SECTION 39.** 854.03 (4) of the statutes is repealed.

24 **SECTION 40.** 854.03 (5) (g) of the statutes is created to read:

Insert 12-15 ✓

1 854.03 (5) (g) The governing instrument ^{statute or} states that this statute, or one similar
2 to it, does not apply.

3 SECTION 41. 854.03 (5) (h) of the statutes is created to read:

4 854.03 (5) (h) Transfers ~~under the governing instrument~~ ^{are controlled by a}
5 provision regarding survivorship that is included a will ^{or} trust ^{executed by the}
6 transferor and that is intended to apply to transfers under other governing
7 instruments also.

8 SECTION 42. 854.03 (5) (i) of the statutes is created to read:

9 854.03 (5) (i) The court finds a contrary intent on the part of the person who
10 executed the governing instrument. Extrinsic evidence ^{transfer is under a governing instrument and the} may be used to construe that
11 intent.

12 SECTION 43. 854.03 (6) of the statutes is amended to read:

13 854.03 (6) EVIDENTIARY STANDARD. Unless the statute or governing instrument
14 provides otherwise, proof that an individual survived the period required under
15 subs. (1) to (4) this section must be by clear and convincing evidence.

16 SECTION 44. 854.03 (7) of the statutes is repealed.

17 SECTION 45. 854.04 (1) (a) of the statutes is amended to read:

18 854.04 (1) (a) Except as provided in subs. (5) and (6), if a statute or a governing
19 instrument calls for property to be distributed to the issue or descendants of a
20 designated person "by representation", "by right of representation," or "per
21 stirpes", the property is divided into equal shares for the designated person's
22 surviving children of the designated person and for the designated person's deceased
23 children who left surviving issue. Each surviving child and each deceased child who
24 left surviving issue are allocated one share.

25 SECTION 46. 854.04 (5) (intro.) of the statutes is amended to read:

The transfer is under a governing instrument and such

or marital property agreement

1 854.04 (5) CERTAIN INDIVIDUALS DISREGARDED. (intro.) For the purposes of this
2 section subs. (1) to (3), all of the following apply:

3 **SECTION 47.** 854.04 (7) of the statutes is created to read:

4 854.04 (7) SPECIFIC WORDS NOT NECESSARY. For the application of subs. (1) to (3)
5 to a statute or governing instrument, it is not necessary that the specific words
6 “issue,” “descendants,” or “issue or descendants” be used in the statute or governing
7 instrument.

 ****NOTE: This provision is not necessary. “Issue” is defined in s. 851.13 for chs. 851
to 882, which means that whenever the word “issue” is used in any of those chapters, it
means what the definition says it means. Additionally, whenever the statutes require
that a *specific* word be used, the word appears in quotes, as is the case in s. 854.04 with
respect to “by representation,” “per stirpes,” etc. The lack of quotation marks around
“issue” and “descendants” should be sufficient to indicate that the *meaning* of those words
is intended in the context, not that those specific words must be used. I recommend that
this subsection be taken out of the draft.

8 **SECTION 48.** 854.05 (5) of the statutes is amended to read:

9 854.05 (5) CONTRARY INTENT. This section does not apply to the extent that a
10 governing instrument, either expressly or as construed from extrinsic evidence,
11 provides otherwise if there is a finding of contrary intent of the person who executed
12 the governing instrument. Extrinsic evidence may be used to construe that intent.
13 A general directive to pay debts does not give rise to a presumption of exoneration.

14 **SECTION 49.** 854.06 (1) (b) of the statutes is repealed.

15 **SECTION 50.** 854.06 (4) (a) of the statutes is renumbered 854.06 (4) (intro.) and
16 amended to read:

17 854.06 (4) CONTRARY INTENT. (intro.) This section Subsection (3) does not apply
18 if there any of the following applies:

19 (c) There is a finding of contrary intent of the decedent. Extrinsic evidence may
20 be used to construe that intent.

21 **SECTION 51.** 854.06 (4) (am) of the statutes is created to read:

1 854.06 (4) (am) The governing instrument provides that a transfer to ~~any~~ ^a
2 predeceased ~~named~~ beneficiary lapses. ✓

3 SECTION 52. 854.06 (4) (b) of the statutes is amended to read:

4 854.06 (4) (b) If the ~~The~~ governing instrument designates one or more persons,
5 classes, or groups of people as contingent transferees, in which case those transferees
6 take in preference to those under sub. (3). But Unless par. (c) applies, if none of the
7 contingent transferees survives, sub. (3) applies to the first group in the sequence of
8 contingent transferees that has one or more transferees specified in sub. (2) who left
9 surviving issue.

10 SECTION 53. 854.07 (3) of the statutes is amended to read:

11 854.07 (3) If a governing instrument other than a will does not effectively
12 dispose of an asset that is governed by the instrument, that asset shall be paid or
13 distributed to the decedent's transferor's probate estate.

14 SECTION 54. 854.12 of the statutes is created to read:

15 **854.12 Debt to transferor.** (1) If an heir owes a debt to the decedent, the
16 amount of the indebtedness ~~due or the present worth of the indebtedness if not~~
17 ~~due~~ shall be ~~charged~~ ^{offset} against the intestate share of the debtor ~~regardless of whether~~
18 ~~the debt has been discharged in bankruptcy.~~ If the debtor fails to survive the
19 decedent, the debt shall not be taken into account in computing the intestate shares
20 of the debtor's issue. ^{CS} RECIPIENT UNDER GOVERNING INSTRUMENT.

21 (2) (a) Subject to par. (c), if a transferee under a governing instrument survives
22 the transferor and is indebted to the transferor, the amount of the indebtedness ~~due~~
23 ~~due, or the present worth of the indebtedness if not due,~~ shall be treated as an offset
24 against property to which the transferee is entitled. ^{debt} ^{reversible}

Insert 15-13

debt

Insert 15-20 ✓

(b) Subject to par. (c), in contesting an offset under par. (a), the transferee shall have the benefit of any defense that would be available to the transferee in a direct proceeding by the personal representative for the recovery of the debt, except that the transferee may not defend on the basis that the debt was discharged in bankruptcy unless that discharge occurred before the execution of the governing instrument. *Insert 16-6* ✓

(c) Paragraph (a) or (b) does not apply if there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

***NOTE: I did not make par. (b) or (c) above apply to par. (a), because both pars. (b) and (c) concern the governing instrument.

SECTION 55. 854.13 (2) (gm) of the statutes is created to read:

854.13 (2) (gm) *Disclaimer by trustee.* The trustee of a trust named as a recipient of property under a governing instrument may disclaim that property on behalf of the trust if the governing instrument authorizes disclaimer by the trustee. If the governing instrument does not authorize disclaimer by the trustee, the trustee's power to disclaim is subject to the approval of the court.

SECTION 56. 854.13 (7) (a) of the statutes is amended to read:

854.13 (7) (a) Unless the transferor of the property or donee of the power has otherwise provided otherwise in a governing instrument, either expressly or as construed from extrinsic evidence, the disclaimed property devolves as if the disclaimant had died before the decedent or before the effective date of the transfer under the governing instrument. If the disclaimant is an appointee under a power exercised by a governing instrument, the disclaimed property devolves as if the disclaimant had died before the effective date of the exercise of the power. If the

1 disclaimant is a taker in default under a power created by a governing instrument,
2 the disclaimed property devolves as if the disclaimant had predeceased the donee of
3 the power. This paragraph is subject to subs. (8), (9), and (10).

4 **SECTION 57.** 854.13 (8) of the statutes is amended to read:

5 854.13 (8) DEVOLUTION OF DISCLAIMED INTEREST IN JOINT TENANCY. ~~A~~ Unless the
6 decedent provided otherwise in a governing instrument, either expressly or as
7 construed from extrinsic evidence, a disclaimed interest in a joint tenancy passes to
8 the decedent's probate estate.

9 **SECTION 58.** 854.13 (9) of the statutes is amended to read:

10 854.13 (9) DEVOLUTION OF DISCLAIMED INTEREST IN SURVIVORSHIP MARITAL
11 PROPERTY. ~~A~~ Unless the decedent provided otherwise in a governing instrument,
12 either expressly or as construed from extrinsic evidence, a disclaimed interest in
13 survivorship marital property passes to the decedent's probate estate.

14 **SECTION 59.** 854.13 (10) of the statutes is amended to read:

15 854.13 (10) DEVOLUTION OF DISCLAIMED FUTURE INTEREST. ~~Unless the instrument~~
16 ~~creating the future interest manifests a contrary intent~~ transferor of the future
17 interest or donee of the power under which the future interest was created provided
18 otherwise in a governing instrument, either expressly or as construed from extrinsic
19 evidence, a future interest limited to take effect in possession or enjoyment after the
20 termination of the interest ~~which~~ that is disclaimed takes effect as if the disclaimant
21 had died before the effective date of the governing instrument or, if the disclaimant
22 is an appointee under a power exercised by a governing instrument, as if the
23 disclaimant had died before the effective date of the exercise of the power.

24 **SECTION 60.** 854.14 (1) of the statutes is repealed.

25 **SECTION 61.** 854.14 (3m) of the statutes is created to read:

1 854.14 (3m) EFFECT IF DEATH CAUSED BY SPOUSE. (a) *Definitions.* In this
2 subsection:

3 1. "Owner" means a person appearing on the records of the policy issuer as the
4 person having the ownership interest, or means the insured if no person other than
5 the insured appears on those records as a person having that interest. In the case
6 of group insurance, ~~the term~~ ^{"owner"} means the holder of each individual certificate of
7 coverage under the group plan and does not include the person who contracted with
8 the policy issuer on behalf of the group, regardless of whether that person is listed
9 as the owner on the contract.

10 2. "Ownership interest" means the rights of an owner under a policy.

11 3. "Policy" means an insurance policy insuring the life of a spouse and providing
12 for payment of death benefits at the spouse's death.

13 4. "Proceeds" means the death benefit from a policy and all other economic
14 benefits from it, whether they accrue or become payable as a result of the death of
15 an insured person or upon the occurrence or nonoccurrence of another event.

16 (b) *Life insurance.* 1. Except as provided in sub. (6), if a noninsured spouse
17 unlawfully and intentionally kills an insured spouse, the surviving spouse's
18 ownership interest in a policy that designates the decedent spouse as the owner and
19 insured, or in the proceeds of such a policy, is limited to a dollar amount equal to
20 one-half of the marital property interest in the interpolated terminal reserve and in
21 the unused portion of the term premium of the policy on the date of death of the
22 decedent spouse. All other rights of the surviving spouse in the ownership interest
23 or proceeds of the policy, other than the marital property interest described in this
24 subsection, terminate at the decedent spouse's death.

1 2. Notwithstanding s. 766.61 (7) and except as provided in sub. (6), if an insured
2 spouse unlawfully and intentionally kills a noninsured spouse, the ownership
3 interest at death of the decedent spouse in any policy with a marital property
4 component that designates the surviving spouse as the owner and insured is equal
5 to one-half of the portion of the policy that was marital property immediately before
6 the death of the decedent spouse.

7 (c) *Deferred employment benefits.* Notwithstanding s. 766.62 (5) and except as
8 provided in sub. (6), if the employee spouse unlawfully and intentionally kills the
9 nonemployee spouse, the ownership interest at death of the decedent spouse in any
10 deferred employment benefit, or in assets in an individual retirement account that
11 are traceable to the rollover of a deferred employment benefit plan, that has a marital
12 property component and that is attributable to the employment of the surviving
13 spouse is equal to one-half of the portion of the benefit or assets that was marital
14 property immediately before the death of the decedent spouse.

****NOTE: I included assets in an IRA that are traceable to the rollover of a deferred
employment benefit plan. Okay?

15 **SECTION 62.** 854.14 (5) (a) of the statutes is amended to read:

16 854.14 (5) (a) A final judgment establishing criminal accountability for the
17 unlawful and intentional killing of the decedent conclusively establishes the
18 convicted individual as the decedent's killer for purposes of this section and s. 861.02
19 (8).

20 **SECTION 63.** 854.14 (5) (b) of the statutes is amended to read:

21 854.14 (5) (b) A final adjudication of delinquency on the basis of an unlawful
22 and intentional killing of the decedent conclusively establishes the adjudicated
23 individual as the decedent's killer for purposes of this section and s. 861.02 (8).

Insert 19-14

fractional interest